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No. 05-996

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT LOUIS MARRAMA,

Petitioner

v.

CITIZENS BANK OF MASSACHUSETTS,
And MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE

Respondents

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The First Circuit Court of Appeals affirmed the decision of the Bankruptcy Appellate Panel for the First Circuit, which affirmed the decision of the Bankruptcy Court for the District of Massachusetts denying the request of the Petitioner, Robert Louis Marrama, to convert his bankruptcy case from Chapter 7 to Chapter 13. The bankruptcy court did so in derogation of the plain language of the statute and of the legislative history. Nonetheless, the Bankruptcy Appellate Panel and the First Circuit Court of Appeals determined that the right to convert a case from one chapter to another, found in 11 USC §706(a), can be denied in the bankruptcy court's discretion if the bankruptcy court determines that the request was made in bad faith. The Bankruptcy Appellate Panel's decision focused on factual determinations, rather than the language of the statute. The First Circuit Court of Appeals focused on statutory construction and determined that although the legislative history says that the right to convert is "absolute", the right can be denied in circumstances such as those presented in this case.

The question presented, therefore, is whether the right to convert a chapter 7 bankruptcy case to another chapter can be denied notwithstanding the plain language of the statute and the legislative history.

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OPINIONS BELOW

The bankruptcy court did not issue a written opinion. The opinion of the Bankruptcy Appellate Panel is reported at Marrama v. Citizens Bank of Massachusetts and DeGiacomo, Trustee (In re Marrama), 313 B.R. 525 (1st Cir. BAP 2004). The decision of the Bankruptcy Appellate Panel denying a motion for rehearing was not reported. The opinion of the First Circuit Court of Appeals is reported under the same title at 430 F. 3d 474 (1st Cir. 2005).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

The opinion of the First Circuit Court of Appeals was rendered on October 31, 2005. This Court granted the Petition for Certiorari on June 12, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE 11. BANKRUPTCY · UNITED STATES CODE
Chapter 7. Liquidation
Subchapter I. Officers and Administration

11 USC §706. Conversion
(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
(b) On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion.
(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

STATEMENT OF THE CASE

Petitioner Robert Louis Marrama commenced a bankruptcy case under Chapter 7 of Title 11, United States Code, on March 11, 2003. Respondent Mark DeGiacomo (hereinafter "DeGiacomo") was appointed trustee, and respondent Citizens Bank was listed as a creditor. The Meeting of Creditors required by 11 USC §341 commenced on April 24, 2003, and was continued several times, finally concluding on November 18, 2003. At the first meeting, DeGiacomo recommended certain amendments to the schedules, which eventually were made.

The bankruptcy case resulted from the breakdown of a business relationship that Marrama had with respondent Citizens Bank, or its predecessors, for about 14 years. Citizens had provided a line or lines of credit to Marrama's business, RLM Flooring, Inc. At some point, Marrama requested an increase in his credit line to help him cope with a temporary cash flow problem. In response, Citizens refused the request and instead called in its note, demanding immediate payment in full. When payment was not forthcoming, Citizens commenced litigation in the Massachusetts Superior Court for Suffolk County. During the course of pre-trial proceedings, Citizens obtained permission of the Superior Court to take possession of all of RLM's assets, including accounts receivable, thereby effectively shutting down the business. Having been rendered unemployed, Marrama sought bankruptcy relief in order to gain "breathing room" and develop a source of income. Being then unemployed, Marrama did not qualify to file under Chapter 13, as he did not have a regular income as required by 11 USC §109(e). The state court litigation never went to trial in the state court.

Among Marrama's assets was a "summer home" in York, Maine, and his permanent residence in Gloucester,

Massachusetts. Although the Maine property was owned in a spendthrift trust, the bankruptcy court determined that the trust was not valid or was revocable[1]. Accordingly, respondent DeGiacomo, as chapter 7 trustee, liquidated that property. On the date of the bankruptcy petition, Marrama was residing in the Maine property. Thus, Citizens took the position that Marrama's homestead exemption for the Gloucester property, claimed pursuant to state law, was invalid. In a published decision, In re Marrama, 307 B.R. 332 (Bkrtcy.D.Mass. 2004), the bankruptcy court overruled Citizens' position. Thus Marrama presently is living in Gloucester, Massachusetts, and that property is exempted from the bankruptcy estate.

Once Marrama was able to find employment[2], he sought to convert the case to Chapter 13 so that he could cure the arrears on his mortgages that arose due to the financial problems that arose from the Citizens litigation, and thereby keep his homes. Both respondents objected to the conversion, claiming essentially that the request was made in bad faith; there was no allegation that Marrama was not qualified to be a debtor under chapter 13. The bankruptcy court, alluding to one of its own published decisions, denied conversion. On intermediate appeal, the Bankruptcy Appellate Panel affirmed, and denied a motion for rehearing. Fortunately, Marrama was able to resolve the mortgage foreclosure issues outside of bankruptcy, and at the time the

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[1] This statement results from the fact that the bankruptcy court allowed DeGiacomo's motion to revoke the trust. The motion was allowed without a hearing, so the bankruptcy court's reasoning is not known with certainty, but that the bankruptcy court so determined is a reasonable inference from allowance of the motion.

[2] His family has been in the flooring business for at least two generations. Thus he was able to find employment with a brother's flooring company.

Petition for Certiorari was granted, he was still living in Gloucester Massachusetts.

A timely appeal to the First Circuit followed. The First Circuit affirmed. A timely Petition for Certiorari was filed in this court, and was granted on June 12, 2006.

SUMMARY OF ARGUMENT

The Bankruptcy Code provides a comprehensive scheme whereby persons, both natural and corporate, may obtain a release, called a "discharge", from the legal obligation to pay most of their debt. Furthermore, it provides an orderly, balanced and systematic method of providing a return to creditors, where possible, while still permitting a debtor to retain certain property in order to enhance the debtor's future prospects.

The Congressional scheme provides essentially two types of bankruptcy: liquidation and reorganization. The various chapters all permit, in essence, a debtor who has filed under one chapter to convert to another chapter. These provisions generally allow one such conversion as a matter of right, subject to certain explicit conditions.

In the statutes that it enacts, Congress is presumed to say what it means and mean what it says. While it cannot be disputed that judges are charged with applying the law to the cases before them – not always an easy task - where a result is mandated by statute, the judge is bound to apply the statute as written, without exception, however inappropriate or distasteful a judge may find the result.

In this case, the bankruptcy judge decided that Marrama had requested conversion from chapter 7 to chapter 13 in bad faith. The determination was made by the bankruptcy judge summarily, i.e., without an evidentiary hearing, based on claims of bad faith made by the chapter 7 trustee and Citizens Bank.

On appeal before the Bankruptcy Appellate Panel for the First Circuit and again in the First Circuit Court of Appeals, Marrama contended that the judge erred by exercising a discretion he did not have, however both courts disagreed and affirmed the bankruptcy court. A timely Petition for Certiorari was filed and granted.

ARGUMENT

I. THE STATUTORY SCHEME OF BANKRUPTCY

In Title 11 of the United States Code, popularly known as the Bankruptcy Code, Congress has set forth a comprehensive scheme whereby persons, both natural and corporate, may obtain a release, called a "discharge", from the legal obligation to pay most of their debt. Although the United States Constitution authorizes Congress to establish uniform laws respecting bankruptcy, Congress did not do so until 1800. *See* Central Virginia Community College v. Katz, 126 S.Ct. 990, 163 L.Ed. 2d 945 (2006) (providing a brief but comprehensive history of bankruptcy in the United States). The law has been amended many times since then, including major changes in 1994 and 2005. The law applicable to this case is that adopted in 1994, as the petition was filed prior to the 2005 amendments.

This scheme has biblical roots[3], and reflects a public policy that encourages those who have faltered economically, and helps them to return to being productive and contributing members of society to the best of their ability. This court has stated that "[i]t is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 35 S.Ct. 289, 59 L.Ed. 713 (1915), *cited in* Local Loan Co. v. Hunt, 292 US 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) *and other cases too numerous to list.* In addition, it provides an orderly, balanced and systematic method of providing a return to creditors,

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[3] *See, e.g.,* Deuteronomy 15.

where possible, while still permitting a debtor to retain certain property in order to enhance the debtor's future prospects. *See* U.S. v. Security Indus. Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed. 2d 235 (1982) (Blackmun, J, concurring in the judgment)[4]. The system makes no guarantees to anyone, but inherently gives hope to those who come within its reaches. Congress has determined that certain debts, such as for child support, alimony, and most taxes, cannot be discharged[5]. In addition, for those who abuse its provisions, the Bankruptcy Code provides for the discharge to be denied[6]. In other parts of the United States Code, certain acts in connection with a bankruptcy case are defined as criminal[7]. Thus, Congress has determined when and how a debtor (or, as the case may be, a creditor) should be punished.

The Congressional scheme provides essentially two types of bankruptcy: liquidation and reorganization. The liquidation chapter is chapter 7; the reorganization chapters are chapter 11 and chapter 13. Although natural persons can be debtors[8] in chapter 11, the procedures and costs associated with chapter 11 make it impractical for most natural persons. In chapter 13, however, the reorganization procedures are

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[4] '...the purpose of the statute is salutary and is to give the debtor a fresh start with a minimum for necessities ...". The Bankruptcy Code permits an individual (i.e., not a corporate debtor) to exempt certain property, *see* 11 USC §522. Property claimed as exempt is exempt unless a party in interest timely objects to the exemption and the objection is sustained. Taylor v. Freeland and Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992). The exemption has the effect of removing the property from the bankruptcy estate, Owen v. Owen, 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed. 2d 350 (1991), thus statutorily depriving the chapter 7 trustee the opportunity to administer the property.

[5] *See* 11 USC §523.

[6] *See, e.g.*, 11 USC §727.

[7] *See, e.g.*, 18 USC §156 *et seq.*

[8] Eligibility for the various chapters is set forth in 11 USC §109.

simpler and the cost significantly less. Corporations are not permitted to be debtors in chapter 13[9].

The various chapters all provide, in essence, that a debtor who has filed under one chapter has discretion to convert to another chapter once as a matter of right, subject to certain explicit conditions. For example, a debtor in chapter 7 apparently may convert, as of right, to any other chapter so long as that debtor is eligible to be a debtor in that chapter and the case has not been converted previously. After the first conversion, leave of the bankruptcy judge is required for subsequent conversions.

II. STATUTORY CONSTRUCTION AND THE STATUTE AT ISSUE

Section 706 of the Bankruptcy Code, quoted in full beginning on page 1, may be summarized as follows: a chapter 7 debtor may convert the case to one under chapter 11, 12, or 13 at any time so long as the case has not been converted previously and the debtor is qualified to be a debtor under that chapter; the right to convert a case cannot be waived. If a party in interest (presumably other than the debtor) requests conversion, the court may convert the case to chapter 11 at any time. However, the court may not convert a case to chapter 12[10] or 13 unless the debtor requests such conversion.

It is a fundamental canon of statutory construction that in the statutes that it enacts, Congress is presumed to say what it means and mean what it says, and if the words of a statute are unambiguous, the judicial inquiry is complete. *See, e.g.,* Connecticut Nat. Bank v. Germain 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed. 2d 391 (1992). Because Congress

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[9] Id.

[10] Chapter 12 is also a reorganization chapter but at all times relevant hereto was limited to "family farmers" as defined by the statute.

does not always speak with crystalline clarity, however, and because Congress cannot reasonably be expected to anticipate every factual scenario that may arise in connection with a statute, it is sometimes necessary to look to the Legislative History. Id. Ultimately, judges are required to interpret statutes in a way that avoids an absurd result, or a result that is plainly contrary to Congressional purpose. Nonetheless, where a statute is clear, and a rational, reasonable interpretation and application of the statute is possible based on the plain language of the statute, judges should not be free to interpret the statute in a way that suits their view of the parties before them. However inappropriate or distasteful a judge may find a certain result, where that result is mandated by statute, the judge is required to apply the statute as written, without exception. Keach v. Boyajian (In re Keach), 243 B.R. 851 (1st Cir. BAP 2000). As a result, when Congress specifies the party to a bankruptcy case who may do something, only that party may do it. In re Muessel, 292 B.R. 712 (1st Cir. BAP 2003).

It is generally held that the use of the word "may" implies permission or discretion. *See* In re Barbieri, 199 F.3d 616 (2nd Cir. 1999), *citing* Anderson v. Yungkau, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947). "[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." In re Hart, 328 F.3d 45 (1st Cir. 2003) (*quoting, in a bankruptcy case,* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (quotation marks and citation omitted). Thus, where Congress says "the debtor" in one place and "the court" (or some other actor) in another, it must be presumed that Congress intentionally made the distinction.

III. THE DECISIONS BELOW

In this case, the bankruptcy judge decided that Marrama had requested conversion from chapter 7 to chapter 13 in bad faith, and decided to punish him by denying his absolute right to convert. JA pg. 35a. No question was raised as to his eligibility to be a debtor in chapter 13 based on the statutory definition of eligibility[11]. The determination was made by the bankruptcy judge summarily, i.e., without an evidentiary hearing, based on claims of bad faith made by the chapter 7 trustee and Citizens Bank. The bankruptcy judge concluded (incorrectly[12]) that Marrama had attempted to conceal property from the trustee and that this constituted bad faith, warranting denial of Marrama's request for conversion to chapter 13. *See* Id.

The Bankruptcy Appellate Panel for the First Circuit did not engage in any extended analysis of the statute, but merely assumed that its interpretation was correct, relying on its own prior decisions and those of other courts that had similarly held. Pet. at pg. 9. On further appeal to the First Circuit Court of Appeals, the court performed the necessary statutory analysis, and concluded that although the statute was not ambiguous, the court nonetheless "would look to the statute's 'historical context, its legislative history, and the underlying policies that animate its provisions." Marrama v. Citizens Bank of Massaachusetts and DeGiacomo, Trustee, 430 F.3d 474 at 4; *Pet. at pg. 29.*

The court then examined the Legislative History, which says:

Subsection (a) of this section gives the debtor the one-

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[11] *See* 11 USC §109(e).

[12] It is surely a foregone conclusion that the Respondents will argue that the facts warranted the bankruptcy judge's decision, so the Petitioner reserves the right to argue the point as well.

> time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

H.R.Rep. No. 95-595, at 380 (1977); S.Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. Finding the term "absolute" to be "problematic, if taken out of context, in that it implies that the debtor's conversion right is unconditional", the court noted that the statute, itself, contained "numerous" conditions that might defeat a debtor's motion to convert. *Pet. at pg. 37.* The court only pointed to one, however, that being that the right is limited to one conversion "as a matter of right". Notwithstanding the finding that the statute is not ambiguous and disregarding the crystal-clear language of the Legislative History, the court then proceeded to create a judicial exception to the right, and to limit the exercise of that right to debtors that the courts deemed to be "honest" in order to prevent debtors from abusing or manipulating the bankruptcy process. *Pet. at pg. 38.*

Marrama respectfully suggests that the term "absolute" does not *imply* anything. Instead, it is a particularly crystal clear statement of Congressional intent and purpose. It gives discretion to a debtor – and *only* to a debtor – voluntarily to convert a case from Chapter 7 to either Chapter 11, 12, or 13 one time, for any reason, and permits judicial inquiry into the conversion *only* for a determination of whether the debtor has previously converted the case from one chapter to another and whether the debtor is qualified to be a debtor in that chapter. There is nothing in the statute or the Legislative History which affords discretion

to a judge to refuse conversion on any other basis. In the Matter of Pequeno (Pequeno v. Schmidt, Trustee), 126 Fed. Appx. 158 (5th Cir. 2005); In re Croston, 313 B.R. 447 (9th Cir. BAP 2004); In re Miller, 303 B.R. 471 (10th Cir. BAP 2003).

There is nothing irrational or absurd about Congress giving discretion to a debtor to decide how to proceed in a bankruptcy case. For example, in a chapter 7 case, the debtor must choose whether to redeem or surrender property subject to security interest, or to reaffirm the debt. 11 USC §521. In a chapter 13 case, only the debtor can file a plan; creditors and the court are not among the universe of parties who may file a plan. 11 USC 1321; In re Muessel, 292 B.R. 712 (1st Cir. BAP 2003). While a plan *must* have certain provisions, the debtor has discretion to decide what other provisions the plan will contain. Id.

There is also nothing irrational or absurd about Congress dictating a certain result or denying a judge discretion. If a chapter 13 plan contains the mandatory provisions and otherwise complies with the Bankruptcy Code, the bankruptcy judge *must* confirm the plan[13]. The only issue the bankruptcy judge decides is whether the plan complies with the statute; she may not alter the plan terms to suit her opinion regarding the debtor's conduct. Keach v. Boyajian (In re Keach), 243 B.R. 851 (1st Cir. BAP 2000).

Similarly, in section 706(c), Congress stated that "the court *may not* convert a case ... unless the debtor requests such conversion." (Emphasis added.) Congress has stated that the phrase "may not" is "prohibitive, and not permissive". 11 USC §102(4). Clearly Congress has

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[13] 11 USC §1325 provides that "the court shall confirm a plan if" it complies with the statute. (Emphasis added.) As noted above, the use of the word "shall" implies a command leaving no room for discretion. The judge's function is limited to determining whether the plan complies. *See* Muessel, *infra*.

dictated the result that obtains when a party other than the debtor seeks to convert a chapter 7 case to chapter 13, and denied the bankruptcy judge discretion to allow an involuntary conversion to chapter 13[14].

Notwithstanding the seemingly crystal clear Congressional directive, whether found in the statute or the Legislative History, some courts have applied a "judicial gloss" to the statute. In re Porras, 188 BR 375 (Bkrtcy.W.D.Tx 1995) (holding that the right to convert from Chapter 7 to Chapter 11 is absolute; collecting cases). The Sixth Circuit, for example, disagreed with both the Fifth Circuit Court of Appeals and the Tenth Circuit Bankruptcy Appellate Panel. In re Copper, 426 F.3d 810 (6th Cir. 2005). The Sixth Circuit expressly recognized the split of authority and that "fair arguments can be made for either position." Nonetheless, the Sixth Circuit concluded that conversion may be denied in the absence of good faith.

Most cases – on both sides of the question – rely on a decision from the Fifth Circuit. Martin v. Martin (In re Martin), 880 F.2d 857, 859 (5th Cir.1989). That court was regrettably imprecise in that it concluded that the right to convert, as indicated by the statute and its legislative history, is absolute, but in the very next sentence, seemed to give courts discretion to deny conversion because it notes that "the courts refuse to interfere with that right in the absence of extreme circumstances."

Recently, however, the Fifth Circuit had occasion to revisit the issue and to clarify the Martin decision. In the Matter of Pequeno (Pequeno v. Schmidt, Trustee), 126 Fed. Appx. 158 (5th Cir. 2005). Although this appears to be an otherwise unpublished decision, it is directly on point and highly material to the present petition, and should be

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[14] The 2005 amendments to the Bankruptcy Code modified this such that a debtor may *consent* to conversion requested by another party, but still denies judges discretion to allow involuntary conversion to chapter 13.

considered by this Court. In this decision, the Fifth Circuit recognized that there is *dicta* in the Martin decision that could be interpreted otherwise, but the court nonetheless clarified its view that "[t]he statutory language makes it clear that the right to convert is absolute and unqualified." The court thereby joined what appears to be a slight majority of courts holding that the right is absolute and unfettered.

This majority, however slim, adheres to the plain language of the statute, which provides only two bases for denying conversion, and to the Legislative History, which explicitly says that the one-time right to convert is absolute. The First Circuit was wrong to impose an additional judicially-created exception which would deny conversion based on a bankruptcy judge's perception of the debtor's motivation, i.e., to punish the debtor for perceived abuses. Congress has mandated that when a debtor requests conversion from chapter 7 to another chapter, the case *must* be converted if the debtor is qualified for relief under that chapter and has not previously requested conversion.

The decisions below erred in creating judicial exceptions to the Congressional mandate. As other circuits have determined, the right to convert once is absolute and may not be abrogated except by Congress in the two circumstances expressly stated by Congress in the statute.

IV. THE BRIGHT-LINE RULE CREATED BY CONGRESS

In creating that mandate, Congress has established a bright-line rule that must be obeyed. The chaos that results when that bright-line rule is not obeyed – i.e., when courts create their own subjective exceptions to the rule made by Congress – is made evident by the extraordinary disparity in application of the exception to the facts in reported cases. It is a seemingly innocent and well intentioned rule; if a debtor requests conversion in bad faith, then the court may deny

conversion. Like pornography, however, "bad faith" is easier to identify than to define[15].

That the absolute right to convert from chapter 7 to another chapter may be denied in "extreme circumstances" appears to have its genesis in a case from the bankruptcy court for the District of Utah. In re Calder, 93 B.R. 739 (Bkrtcy.D.Utah. 1988). In that case, the debtor was an attorney who had filed several cases and, in the view of the bankruptcy court, was abusing the system solely to gain an advantage against his creditors and did not have a sincere desire to pay his creditors. The bankruptcy court invoked its power under 11 USC §105[16] to deny conversion in order to

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[15] "Bad faith" is presumably the opposite of "good faith". Keach v. Boyajian (In re Keach), 243 B.R. 851 (1st Cir. BAP 2000), *supra*. "The term "good faith" is not easily defined and the requirement is not capable of pragmatic and mechanical application. In the last analysis it is the same as pornography, one cannot define it but will readily recognize it when one sees it." In re Noll, 172 B.R. 122 (Bkrtcy.M.D.Fla. 1994). *citing* Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J.)

[16] Section 105 of the Bankruptcy Code gives bankruptcy courts authority, in essence, to issue any writ or order "necessary or appropriate to carry out the provisions of this title." However, that section is not a "roving writ, much less a free hand." Jamo v. Katahdin Federal Credit Union (In re Jamo), 283 F.3d 392, 403 (1st Cir. 2002); *see also* In re Barbieri, 199 F.3d 616 (2nd Cir. 1999) (court may not disregard the plain language of a statute and exercise discretion where none is afforded); *cf.* Norwest Bank Worthington v. Ahlers, 485 US 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1998) (not mentioning §105 but stating that whatever equitable powers the bankruptcy courts have can only be exercised within the confines of the Bankruptcy Code). In the present case, the Bankruptcy Appellate Panel for the First Circuit properly and soundly rejected the use of §105 in this context, Pet. at pg. 22, fn. 6, but nonetheless held that the "totality of the circumstances" can justify denial of the absolute right to convert. Marrama v. Citizens Bank of Massachusetts and DeGiacomo, Trustee, 313 B.R. at 533 (1st Cir. BAP 2004). The First Circuit was less forceful about rejecting the use of §105, but nonetheless did not rely on it, Pet. at 32.

prevent further abuse of the system. About four years later, in considering an appeal in the same case but on a different issue, the Tenth Circuit disclosed that the debtor had appealed the denial of conversion to the district court, and the district court had reversed in an unpublished decision. Calder v. Job et al, 973 F.2d 862 (10th Cir. 1992). While it may be *dicta*, the Tenth Circuit did agree with Calder "that the Bankruptcy Rules cannot override the absolute right to convert pursuant to §706(a)." Thus it seems clear that the bankruptcy court's decision in Calder is neither good precedent nor a proper foundation for the myriad of decisions that followed it. More recently, the Tenth Circuit Court of Appeals in In re Young, 237 F.3d 1168 (10th Cir. 2001), and the Bankruptcy Appellate Panel for the Tenth Circuit in Miller v. United States Trustee, et al, 303 B.R. 471 (10th Cir. BAP 2003), both confirmed that the law in that circuit is that the right to convert is absolute[17], thus joining the Fifth Circuit, *see* In the Matter of Pequeno (Pequeno v. Schmidt, Trustee), 126 Fed. Appx. 158 (5th Cir. 2005).

What constitutes "extreme circumstances" is not "capable of pragmatic and mechanical application."[18] The "extreme circumstances" standard leaves debtors and their counsel with no reliable guide as to how the law will be applied. Accordingly, bankruptcy courts should be required to follow the bright-line rule that Congress has established; conversion should only be denied if the debtor is not qualified for relief under the chapter to which conversion is

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[17] The Tenth Circuit stated that conversion could occur even after the discharge had entered, thus following the plain language of the statute which says that a debtor may convert "at any time".

[18] *See* Noll, note 15, *supra*.

sought, as defined in 11 USC §109, or if the case has already been converted once[19].

Failure to follow that bright-line rule, combined with other mis-readings of the statute, has caused much damage to debtors, and, by extension, to creditors, as well[20]. In one decision, In re Ponzini, 277 B.R. 399 (Bkrtcy.D.Ar. 2002), cited by the Bankruptcy Appellate Panel for the First Circuit in this case, Pet. at pg. 23, fn.7, the bankruptcy court initially correctly quoted the statute: "The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, ..." but then proceeded to change the statute's language: "Moreover, and most importantly, §706(a) states that the court 'may' convert a case at any time." (emphasis added.) Id. at 404. Section 706(a) does not say any such thing; it says that the debtor may convert a case at any time. Thus the statute gives the debtor discretion, not the court. *See* In re Barbieri, 199 F.3d 616 (2nd Cir. 1999) (court may not disregard the plain language of a statute and exercise discretion where none is afforded). This flawed reading of the statute unfortunately was persuasive in the present case to the Bankruptcy Appellate Panel for the First Circuit. In denying Marrama's motion for rehearing on that and other points, the Panel held, in essence, that the distinction is irrelevant. Marrama respectfully disagrees; the distinction is important because it is a distinction made by Congress in its choice of language.

More recently, the Bankruptcy Appellate Panel for the Sixth Circuit recited a litany of alleged sins by a debtor, and

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[19] If the case has already been converted once but the debtor qualifies for relief under the chapter to which conversion is sought, conversion becomes discretionary with the bankruptcy court.

[20] In order to be confirmed, a chapter 13 plan must propose to pay creditors at least as much as they would receive in a chapter 7 liquidation. Thus, courts which deny conversion deny creditors the opportunity to receive *more* than they otherwise would have received.

noted that the bankruptcy court had found that the desire to convert to chapter 13 was "motivated solely by a desire to avoid a determination that the Debtor was not entitled to a discharge (or that his obligations to Ms. Copper are nondischargeable) and not by a desire to repay his creditors, and that the motion thus represented an improper attempt to 'manipulate the Bankruptcy Code.'" In re Copper, 314 B.R. 628 (6th Cir. BAP 2004). Given that the ultimate goal of *all* individual debtors is to obtain a discharge[21], Marrama fails to see anything wrong with "a desire to avoid a determination that the Debtor was not entitled to a discharge" under chapter 7, or that certain obligations are nondischargeable, especially since it is Congress that stated that some debts that may not be discharged in chapter 7 nonetheless *can* be discharged in chapter 13. Furthermore, to the extent that there is improper manipulation of the Bankruptcy Code, it can be remedied without denying the debtor a right granted by Congress[22].

V. THE POLICY UNDERLYING THE RIGHT TO CONVERT.

In reaching its conclusion, the First Circuit Court of Appeals analyzed the statute and concluded that although the statute was not ambiguous, the court nonetheless "would look to the statute's 'historical context, its legislative history, and the underlying policies that animate its provisions.'"

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[21] Corporate debtors are not entitled to a discharge in chapter 7. *See* 11 USC §727(a)(1).

[22] *See, e.g.*, In re Croston, 313 B.R. 447 (9th Cir. BAP 2004) ("We are not persuaded by decisions that deny §706(a) motions in order to foil perceived dysfunction," *citing as non-persuasive, inter alia* Kuntz v. Shamban (In re Kuntz), 233 B.R. 580 (1st Cir. BAP 1999). *Cf.* Taylor v. Freeland and Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) (remedy for a debtor claiming an exemption to which he is not entitled is not denial of the exemption where the objection to the exemption was untimely, as there are remedies that do not require violating the plain language of the rule).

Marrama v. Citizens Bank of Massaachusetts and DeGiacomo, Trustee, 430 F.3d at 4; *Pet. at pg. 36*. The court then quoted from the Legislative History:

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individuai repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

citing H.R.Rep. No. 95-595, at 380 (1977); S.Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. The court then observed that

> It is the pronounced policy of subsection 706(a) "that the debtor should always be given the opportunity to repay his debts," H.R.Rep. No. 95-595, at 380, thus should be given one chance to effectuate a viable chapter 13 plan. It is plainly implicit in this legislative observation, however, that such an opportunity is to be accorded only to *honest* debtors.

The implication is not so plain to Marrama, or to those courts that find the right absolute, as it is to the First Circuit. The persistent reference to "honest" debtors, especially in cases which deny that the right is absolute, no doubt take their cue from this court's oft-repeated statement in Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 35 S.Ct. 289, 59 L.Ed. 713 (1915), *cited in* Local Loan Co. v. Hunt, 292 US 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) *and other cases too numerous to list*, that bankruptcy relief is intended to afford the "honest but unfortunate debtor" a fresh start on her financial life.

It is perhaps too easy for bankruptcy courts to take the word "honest" in that quotation and mis-apply it to justify whatever result seems appropriate. Literal application would cause plainly absurd results because, for example, it is Congress that decides what type of debts may be discharged. *See, e.g.,* 11 USC §727 *and* 11 USC §1328. Under chapter 13, even actual fraud may be discharged[23]. A debtor that committed actual fraud prior to filing a bankruptcy petition does not fit within the conventional understanding of "honest". Thus bankruptcy courts are abusing their discretion when they refuse to permit conversion from chapter 7 to chapter 13 based on the fact that the debtor is seeking a remedy in chapter 13 that would not be available in chapter 7; it is not bad faith to seek a remedy that the law allows. *See* In re Croston, 313 B.R. 447 (9th Cir. BAP 2004), *citing* Street v. Lawson (In re Street), 55 B.R. 763 (9th Cir. BAP 1985) ("neither conduct nor motive vitiates the absolute nature of the right to convert;" conversion after a judgment of non-dischargeability is not "manipulation of the Bankruptcy Code").

Nonetheless, the First Circuit felt that the Congressional policy as stated in the Legislative History could be overridden:

> A legislative policy aimed at encouraging able debtors to undertake the voluntary repayment of their lawful credit obligations plainly is not served where the bankruptcy court has determined, as a threshold finding of fact, that the debtor is utilizing his subsection 706(a) conversion rights to advance an

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[23] The discharge under chapter 13 frequently has been referred to as a "super-discharge" since a broader range of debts could be discharged in chapter 13. The 2005 amendments to the Bankruptcy Code eliminated many, but not all, of the differences in discharges between the chapters, but these amendments are not applicable in this case.

> ongoing scheme to retain his non-exempt assets from bona fide creditors.

430 F.3d at 481; *Pet. at pg. 39.* It appears to be the alleged "scheme" that concerned the First Circuit, as a few paragraphs later, the court observed that "the instant conversion ... would divest the chapter 7 trustee of any authority to act in behalf of the estate to safeguard its assets. *See* Bankruptcy Code § 348(e), 11 U.S.C. § 348(e). Thus, in the event the debtor were to succeed in securing confirmation of a chapter 13 plan, he could reacquire his interest in 'property of the estate,' *as well as the concealed property.*" (Emphasis in the original.)

Leaving aside the fact that there is absolutely no proof in the record whatsoever that Marrama *concealed* any property and that concealment was not the true issue before the bankruptcy court[24], the result which the First Circuit found so unpalatable is precisely the result which Congress dictates. 11 USC §348(e) states that "conversion ... terminates the service of a trustee or examiner that is serving in the case before such conversion." If Congress wanted the same trustee to continue to serve as trustee, it would have said so. Similarly, if Congress wanted chapter 13 trustees to have exactly the same powers as chapter 7 trustees, it would have said so. *Compare, e.g.,* 11 USC §704 *with* 11 USC §1302. The reference to reacquiring "his interest in 'property of the estate'" is also meaningless since that is precisely the result Congress intended; 11 USC §1327(b) provides that property of the estate revests in the debtor except as set forth in the plan or the order confirming the plan[25]. Furthermore,

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[24] That being the omission of the transfer from the Statement of Financial Affairs, which was a mere scrivener's error. Somehow this issue transmogrified into concealment, which is clear error.

[25] There is a debate about what it means for property to "vest in the debtor", at least in the First Circuit. *See* Barbosa v. Soloman, 235 F.3d 31

since an explicit requirement for confirmation is that general unsecured creditors receive *at least* as much in chapter 13 as they would in chapter 7 (and usually more), there is no harm to creditors in a chapter 13 plan being confirmed; ideally, they benefit, especially if the case would otherwise result in no payments to creditors. *See* 11 USC §1325(a)(4).

None of the First Circuit's allegedly policy-based reasons for disregarding the plain language of the statute and the Legislative History have any basis in law. Ultimately, there is nothing wrong with wanting to convert to chapter 13 in order to retain an asset, as that is exactly what Congress has permitted in chapter 13[26]. Congress plainly stated that the policy of 11 USC §706 is that a debtor should always be given the opportunity to repay his debts and, by extension, to retain his non-exempt assets. Denying debtors that opportunity for subjective reasons, or to punish the debtor, plainly offends Congressional purpose; finding that the right to convert is absolute puts that policy into effect.

VI. A DEBTOR'S DUE PROCESS RIGHTS AND CONVERSION

In justifying its conclusion that the right to convert is not absolute, the First Circuit noted, correctly, that pursuant to 11 USC §1307, the bankruptcy court has discretion to

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(1st Cir. 2000) (affirming the district court's holding that vesting in the debtor does not mean that such property is no longer property of the estate). In that case, the bankruptcy court held that vesting means, essentially, that the property is removed from the estate, a position that would lend some support to the First Circuit's concern in this case. However, the district court held that position to be an error of law and the First Circuit affirmed the district court. Thus the First Circuit's concern here is contradictory to its prior holding in Barbosa.

[26] *Cf.* In re Miller, 113 B,R, 98 (Bkrtcy.D.Mass. 1990) (In Massachusetts, declaring a homestead exemption is not a fraudulent transfer because it is not a "transfer" at all and is expressly permitted by statute; it is not "bad faith" to do what the law allows.)

reconvert or dismiss a chapter 13 case "for cause". Pet. at pg. 39. The circuit court saw no reason to require the "technical formality" that the case actually be converted to chapter 13 before considering allegations of bad faith, and that "cause" includes a failure to propose a plan in "good faith" as required by 11 USC §1325(a)(3). Pet. at pg. 39. In Marrama's view, that requirement is engrained in the statute and the bankruptcy rules, and short-circuiting the statutory procedure violates a debtor's due process rights.

The elements of due process were firmly established by this court's decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Due process requires notice and an opportunity to be heard, Id., and has both procedural and substantive aspects. *See* In re Melendez-Colon, 265 B.R. 639 (1st Cir. BAP 2001). It is a violation of due process for a bankruptcy court to decide issues not presented or to make factual determinations where no evidence was presented[27]. Id; In re Muessel, 292 B.R. 712 (1st Cir. BAP 2003). When seeking conversion from chapter 7 to chapter 13, there is no requirement that a chapter 13 plan be filed before conversion can be allowed. In fact, Fed.R.Bankr.P. 3015(b) provides that when a case is converted, the debtor has fifteen days to file a plan; in other words, the obligation to file a plan does not arise until the case actually is converted. The time can be extended, but can not be reduced. Fed.R.Bankr.P. 9006(c)(2). *Cf.* Taylor v. Freeland and Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) (holding that an objection to a claim of exemption, or a request for an extension of time to object, must be filed within the time allowed and pursuant to

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[27] Such as the determination by the BAP in this case that Marrama had improperly claimed a homestead exemption. While the BAP had this case under advisement, the bankruptcy court, itself, determined that the homestead exemption was properly claimed. In re Marrama, 307 B.R. 332 (Bkrtcy.D.Mass. 2004).

Fed.R.Bankr.P. 9006, the time cannot be enlarged; good faith in claiming the exemption is not relevant[28]). Thus, determinations of good faith based solely on a request for conversion lack any evidentiary support, especially where, as here, no plan was filed, and violate due process because good faith is not a condition to conversion.

The procedure apparently followed by the bankruptcy court in In re Cabral, 285 B.R. 563 (1st Cir. BAP 2002), would seem to be the correct procedure. According to the BAP, the bankruptcy court converted that case to chapter 13 "as of right" when the request was made, and thereafter treated the chapter 7 trustee's objection to conversion as a motion to reconvert. The bankruptcy court held a non-evidentiary hearing and concluded that the plan was not filed in good faith as required by 11 USC §1325 and was otherwise unconfirmable, and converted the case back to chapter 7. It is clear that the bankruptcy court was conducting the appropriate analysis under chapter 13, with evidence properly before her, and not good faith in requesting the conversion. Due process was observed.

It is also clear that in that case, a chapter 13 plan had been filed, even though the Rule does not require it until after conversion. In the present case, no plan had been filed, so the bankruptcy court had no evidence before it from which it could make findings concerning Marrama's good faith in filing a plan or the confirmability of the plan[29]. Although a non-evidentiary hearing was held, the only "evidence" presented to the bankruptcy court was the representations of

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[28] In the same way, good faith is not an issue on a motion to avoid a creditor's non-consensual judicial lien; the statute only requires the court to conduct an arithmetic test and the court cannot use its discretion in applying the statute. In re Snyder, 279 B.R. 1 (1st Cir. BAP 2002).

[29] For the same reason, the Chapter 13 Trustee's remarks at the hearing in the bankruptcy court, JA pg. 34a, were utterly meritless, especially as the Chapter 13 Trustee had no standing to be heard at the time.

counsel, which are not evidence at all. Both the BAP and the First Circuit, however, held that this procedure was appropriate because no evidentiary hearing had been requested. Since it is a fundamental requirement that summary judgment be denied when material facts are in dispute, *see* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986), it is error to require that an evidentiary hearing be *requested* when there is no evidence properly before the court which would justify summary judgment; it is incumbent on the court to recognize the factual dispute and set the matter for trial.

This means that the procedure required by the Rules reinforces the view that the right to convert is absolute. If a request for conversion could be denied based upon the provisions of a proposed plan or for other reasons, the Rule would require that a plan be filed with the request so that the bankruptcy court could have the plan before it. That is not what the Rule says, however; it says that the plan must be filed within 15 days *after* conversion. Similarly, nothing in Fed.R.Bankr.P. 1017(f)(2) permits a bankruptcy court to take evidence when considering a motion to convert a chapter 7 case, except regarding the two conditions in the statute. In re Porras, 188 BR 375 (Bkrtcy.W.D.Tx 1995). If the right were not absolute, conversion would be defined by the Rules as a contested matter, subject to Fed.R.Bankr.P. 9014. Id.

Nothing in the Bankruptcy Code or rules permits bankruptcy courts to impose their own subjective requirements for conversion of a case from chapter 7 to another chapter or to consider evidence on any question other than the explicit statutory restrictions on conversion. Doing so violates the due process rights of debtors because it imposes requirements and restrictions not contemplated by Congress. Procedural due process requires that when a statute or rule establishes the procedure to be followed, that procedure must be followed.

CONCLUSION

The plain language of 11 USC §706 states that a debtor may convert a chapter 7 case to another chapter, so long as the debtor is qualified to be a debtor in the chapter to which conversion is sought and the case has not been previously converted. In those circumstances, the statute gives the debtor discretion to convert. Nothing in the statute, however, gives the bankruptcy court discretion to deny the absolute right for subjective reasons not found in the statute. Courts which add other requirements or restrictions, or seek to punish a debtor because of perceived abuses, err because they violate the Congressional policy clearly set forth in the Legislative History, which unambiguously states that the one-time right of conversion is absolute.

For all of the foregoing reasons, the petitioner requests that the First Circuit Court of Appeals be reversed, and that this case be remanded to the bankruptcy court for the District of Massachusetts for further proceedings consistent with this Court's opinion.

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Respectfully submitted,
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